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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	Case No. 07-5944 SC MDL No. 1917
This Document Relates to: *The Indirect Purchaser Action*	**THE TOSHIBA DEFENDANTS' MOTION TO DECERTIFY THE STATEWIDE IPP CLASSES FOR DAMAGES** **ORAL ARGUMENT REQUESTED** Date: August 7, 2015 Time: 10:00 a.m. Before: Hon. Samuel Conti

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 7, 2015, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 1, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Samuel Conti, the Toshiba Defendants will and hereby do move the Court for an order decertifying the Indirect Purchaser Plaintiff ("IPPs") statewide classes for damages.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the declaration of J. Frank Hogue and accompanying exhibits, the complete files and records in this action, oral argument of counsel, authorities that may be presented at or before the hearing, and such other and further matters as this Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES

1. Whether the statewide IPP classes for damages should be decertified because the record as developed over the course of this case has established that—contrary to the IPPs' representations at the class-certification stage—membership in the classes is not presently ascertainable.

2. Whether the statewide IPP classes for damages should be decertified because the IPPs cannot establish class-wide antitrust injury with predominantly generalized evidence.

II. INTRODUCTION

Rule 23(c)(1)(C) of the Federal Rules of Civil Procedure expressly authorizes a court to alter or amend an order granting or denying class certification at any time before final judgment. "A district court may decertify a class at any time." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). As the Ninth Circuit has held, before entry of final judgment on the merits, a district court's order respecting class status is not final or irrevocable, but rather, is inherently tentative. *See Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982) (citing *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147,

160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation.")); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978) ("a district court's order denying or granting class status is inherently tentative."). Courts exercise their authority to decertify class actions when it becomes clear that the requirements of Rule 23(a) or (b) are not satisfied. *See, e.g.*, *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724-LHK, 2014 WL 7148923, at *15 (N.D. Cal. Dec. 15, 2014) (decertifying class where plaintiff failed to put forth evidence that damages could be determined using predominantly common evidence); *Estrella v. Freedom Fin. Network, LLC*, No. 09-CV-03156-SI, 2012 WL 214856, at *5 (N.D. Cal. Jan. 24, 2012) (decertifying class when class became "bereft of representatives"); *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 421 (C.D. Cal 2000) (decertifying class where subsequent developments showed plaintiffs no longer satisfied Rule 23(a) and (b)).

With discovery now complete, the record reveals two independent reasons that compel decertification of each of the IPPs' twenty-two separate statewide damages classes.

First, after years of discovery, it is now evident that the IPPs have failed to deliver on their promise to the Court, at the class certification stage, that their classes would be ascertainable. Indeed, the IPPs went so far in their promise that "it will be relatively simple to determine class membership at the appropriate time," that their lead counsel submitted a declaration in support of class certification explaining that it could be simply done. Reply Brief in Supp. of IPPs' Mot. for Class Cert., ("IPP Reply") Dkt. 1654 (Feb. 15, 2013) at 40 (stating that it was acceptable to grant class certification even if class membership "would require subsequent evidentiary submissions"); Toshiba Ex. A (Reply Decl. of Mario N. Alioto in Supp. of Mot. of IPPs for Class Cert., dated Feb. 15, 2013, at 1). Despite that pledge, the IPPs have failed to come forward with any administrable methodology, much less a simple one, to identify those consumers who purchased a finished product that contained an allegedly price-fixed CRT. The IPPs' failure on this fundamental issue compels a finding that the classes are not ascertainable. *See Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, at *6 (N.D. Cal. Feb. 13, 2014) (Conti, J.) (denying class certification

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where plaintiff failed to produce an administratively feasible method for determining class membership).

Second, the IPPs have also failed to deliver on their promise that the alleged cartel's impact "for CRTs" could be determined using a common methodology. Toshiba Ex. B (Decl. of Janet S. Netz, Ph.D., in Supp. of Mot. of IPPs for Class Cert., dated Oct. 1, 2012) at 5. After the class was certified, IPP economist Dr. Janet Netz came forward with a damages methodology that measured CDT (for computer monitors) and CPT (for televisions) overcharges and pass through separately. Toshiba Ex. C (Expert Report of Janet S. Netz, Ph.D., dated April 15, 2014) at 104. Now that discovery is complete, the IPPs concede through their expert that CDTs and CPTs are heterogeneous products, "used in two distinct applications," that are "not functional or economic substitutes" and for which "there is almost no demand substitution." *Id.* at 7-8. Dr. Netz therefore separately analyzes antitrust impact for CDTs and CPTs by estimating separate CDT and CPT regressions for each and separately measuring "pass through" to television and computer monitor purchasers. She estimates separate CDT and CPT regressions because those products "did not respond to changes in market conditions in the same manner." *Id.* at 104. While her overcharge estimates have varied during discovery, Dr. Netz's current opinion is that the alleged cartel caused a 22% overcharge for CDTs as opposed to a 9% overcharge for CPTs between 1995 and 2006. Dr. Netz also has different overcharge estimates for 2007 of [redacted]. Toshiba Ex. D (Rebuttal Expert Report of Janet S. Netz. Ph.D., dated Sept. 26, 2014) at 95. To measure "pass through" to indirect purchasers, Dr. Netz uses data "from a sample of firms" in the distribution chain to separately estimate pass through for finished products containing CDTs and CPTs. Toshiba Ex. C at 107. Reprising the same methodology rejected by Northern District Judges in both *In re Flash Memory Antitrust Litigation*, No. C 07-0086, 2010 WL 2332081 (N.D. Cal. June 9, 2010), and *In re Graphics Processing Units Antitrust Litigation*, 252 F.R.D. 478 (N.D. Cal. 2008), [redacted]

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[redacted]. Toshiba Ex. C at 118. Dr. Netz's work shows that the IPPs have no common methodology to measure antitrust impact in this case. Indeed, Dr. Netz's pass-through analyses actually prove that individual issues abound—as other courts in this district have found.

With discovery now closed, it is clear that the statewide IPP classes for damages cannot go forward and that decertification is required.

III. PROCEDURAL HISTORY

In his Report and Recommendation, the Interim Special Master recommended that the Court certify twenty-two separate statewide classes for damages pursuant to Rule 23 of the Federal Rules of Civil Procedure. Special Master's Report and Recomm. Re IPPs' Mot. for Class Cert., Dkt. 1742 (June 20, 2013) ("R&R"), at 39-49. The Interim Special Master determined that the proposed classes satisfied the requirements of Rules 23(a) and 23(b)(3) and the "threshold" requirement that the proposed classes be "presently ascertainable." R&R at 11. Specifically, the Interim Special Master recommended that the Court certify statewide classes for damages of "all persons and entities . . . who, from March 1, 1995 to November 25, 2007, . . . purchased Cathode Ray Tubes incorporated into televisions and monitors . . . indirectly from any defendant or subsidiary thereof, or any named affiliate or any named co-conspirator, for their own use and not for resale." R&R at 40-49 (recommending slightly different dates for the Hawaii, Nebraska, and Nevada classes). Following briefing and oral argument, the Court adopted the R&R and certified the classes as recommended. Order Adopting Special Master's Reports and Recomms. on Defs' Mot. to Exclude Expert Test. and IPPs' Mot. for Class Cert., Dkt. 1950 (Sept. 24, 2013) ("Order").

The Interim Special Master's R&R recognized that ascertainability was a threshold requirement before a class could be certified under Rule 23. R&R at 11. In finding that this threshold requirement was sufficiently satisfied for initial class certification, the Interim Special Master relied upon the IPPs' assurances, contained in the declaration of class counsel, that the manufacturer of the CRT in any given computer monitor or television could be identified by putative class members simply by examining the model number printed on the

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outside of each individual finished product or by disassembling the product and viewing the tube itself. Toshiba Ex. A at ¶5; R&R at 14. On the issue of predominance, the Court and Interim Special Master relied principally on two declarations focused on class certification submitted by Dr. Netz. Order at 13 ("Based on Dr. Netz's methodology . . . and the ISM's thorough [R&R], the Court is satisfied that for class certification purposes, the IPPs have established a common method for proving that each class member was injured…"); R&R at 22-28 (relying upon Dr. Netz's declarations for findings as to impact and pass through). Subsequent development of the record in this action has fatally undermined the declaration of IPP class counsel and IPPs' expert Dr. Netz.

IV. ARGUMENT

In cases such as this, where certification precedes full merits discovery, the decision to certify may "require revisiting upon the completion of full discovery." *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (affirming denial of class certification where class-wide impact could not be established with common proof). A more developed discovery record, including "the discovery of new facts or changes in the parties or in the substantive or procedural law, will necessitate reconsideration of the earlier order and the granting or denial of certification or redefinition of the class." *O'Connor*, 197 F.R.D. at 409-10 (quoting *Cook v. Rockwell Int'l Corp.*, 181 F.R.D. 473, 477 (D. Colo. 1988)). When the requirements of ascertainability and predominance are not satisfied, courts must decertify the defective class. *See In re POM Wonderful LLC*, No. ML 10–02199 DDP (RZx), 2014 WL 1225184, at *5-6 (C.D. Cal. Mar. 25, 2014) (decertifying class at the close of discovery because common issues did not predominate and there was "no way to reliably determine who purchased Defendant[s'] products or when they did so.").

When confronted with a motion for decertification, a court applies the same legal standard it would at the class-certification stage. *See Werdebaugh*, 2014 WL 7148923, at *4 ("The standard used by the courts in reviewing a motion to decertify is the same as the standard when it considered Plaintiffs' certification motions."). That is, the burden is on the putative class to show that class certification remains appropriate. *See Ries v. Ariz. Beverages*

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USA LLC, No. 10-01139 RS, 2013 WL 1287416, at *3 (N.D. Cal. Mar. 28, 2013) ("On a motion for decertification, the burden remains on the IPPs to demonstrate 'that the requirements of Rule 23(a) and (b) are met.'") (quoting *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011)). When decertification is sought, the court applies these same legal standards but to the more developed discovery record. *See In re POM*, 2014 WL 1225184, at *7.

A Court must engage in a "rigorous analysis" to determine whether the party seeking class certification has affirmatively demonstrated compliance with Rule 23. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("A party seeking class certification must affirmatively demonstrate . . . compliance with the Rule."); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) ("Before certifying a class, the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23.") (quoting *Zisner v. Accufix Research Inst. Inc.*, 253 F.3d 1180, 1186, amended by 273 F.3d 1266 (9th Cir. 2001)). Only after a rigorous analysis can a Court determine that it is appropriate to depart from the "usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)).

A. The IPP Classes Do Not Meet the Threshold Requirement of Present Ascertainability

In order for a class action to proceed, the class must be clearly and presently ascertainable. *See Sethavanish*, 2014 WL 580696, at *4 ("A class definition should be precise, objective, and presently ascertainable.") (quoting *O'Connor v. Boeing N. Am. Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. 10-4387 PJH, 2014 WL 60097, at *3 (N.D. Cal. Jan. 7, 2014) ("the class must be adequately defined and clearly ascertainable before a class action may proceed."); *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011) ("As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists."). In the Ninth Circuit, the ascertainability

question is a "threshold" test that must be satisfied before considering Rule 23's requirements. *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1071 n.3 (9th Cir. 2014). The question of ascertainability is "key" because it allows potential class members to opt out, it "ensures that a defendant's rights are protected," and it "ensures that the parties can identify class members in a manner consistent with the efficiencies of a class action." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307, 312 (3d Cir. 2013) (vacating class certification where class membership could not be ascertained through a reliable and feasible method). Here, the lack of ascertainability is fatal to the IPPs' damages classes.

The IPP classes here are not ascertainable because identifying "persons or entities" who "purchased Cathode Ray Tubes incorporated in televisions and monitors . . . indirectly from any defendant or subsidiary thereof, or any named affiliate or any named co-conspirator" will require millions of individualized inquiries into whether a CRT incorporated into a finished product was manufactured by a "defendant," "subsidiary," "named affiliate" or "named co-conspirator." An individualized inquiry is necessary because the IPPs concede that not all CRT manufacturers participated in the alleged conspiracy. Toshiba Ex. C at Exs. 4-5. And therefore not all CRT finished products contain an allegedly price-fixed CRT. In this respect, the situation is akin to that which now-Chief District Judge Hamilton addressed in *Astiana*, where the plaintiff alleged an injury based on the purchase of a Ben & Jerry's product that contained a synthetic ingredient. 2014 WL 60097, at *3. The plaintiff sought to represent a class of individuals who had purchased Ben & Jerry's products manufactured with this synthetic ingredient. The plaintiff, however, was unable to establish that the class was ascertainable because Ben & Jerry's used multiple suppliers for its products and one or more of those suppliers used the synthetic ingredient. *Id.* ("Because plaintiff has not shown that a method exists for determining who, among the many California purchasers of Ben & Jerry's, fits within the proposed class, the class is not ascertainable."). Here, as in *Astiana*, the IPPs have no administrable method to determine which television and monitor purchasers actually purchased an allegedly price-fixed tube inside of their product.

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At the class certification stage, the IPPs put forward two approaches to determine ascertainability. First, the IPPs asserted that the classes were ascertainable because an individualized inquiry at the claims administration stage could identify those persons who purchased a CRT television or computer monitor that contained a CRT manufactured by an alleged conspirator. Toshiba Ex. A at 1; IPP Reply at 38-39. Specifically, IPPs claimed that potential class members could determine the identity of the manufacturer of the CDT or CPT contained in their monitor or television by matching their product's model number with "service manuals and/or other publically available information." Toshiba Ex. A at 2. Second, the IPPs asserted that class members could identify the tube manufacturer of their unit by removing the screws from the back of their product and viewing the CRT model number. IPP Reply at 39. The IPPs and their lead counsel asserted that "subsequent evidentiary submissions" could substantiate class membership. IPP Reply at 40.

In discovery, the IPPs never supplemented the record as to ascertainability and never came forward with an administrable method to determine class membership. Further compounding the ascertainability problem is that most U.S. consumers no longer possess the CRT products they purchased or the user manuals that came with them. The testimony by many of the class representatives is clear on this point. For example, the class representatives from Arizona, Florida, and Nevada, as well as one of the California class representatives, and one of the New York representatives testified that they no longer have the CRT products, or manuals for those products, for which they claim damages. *See*, Toshiba Ex. E (Brian Luscher (Arizona) Dep. Tr. 46:10-11, 46:18-20, 49:11-13 ("Q. So you do not currently own this television anymore? A. No, I do not currently own it.")); Toshiba Ex. F (David Rooks (Florida) Dep. Tr. 49:10-11, 48:8-12, 82:23-25, 73:21-23 ("Q. Do you still have the Panasonic television? A. No. Q. Did a user guide or manual come with your product? A. Yes, it did. Q. Do you still have that? A. No, I don't. Q. -- you no longer own the television? A. No, I don't.")); Toshiba Ex. G (Louise Wood (New York) Dep. Tr. 33:22-25, 84:14-15, 32:22-24 ("Q. Do you still have the owner's manual? A. I do not. Q. Do you still own the television that's the basis for your claim? A. No, I do not.")); Toshiba Ex. H (Jeffrey Figone (California)

Dep. Tr. 69:17-19; 69:20-24, 70:3-5 ("Q. Do you still have the Sharp television set today? A. No. Q. Do you have any documents, like an owner's manual or something else, that would verify that the Sharp television set you purchased in 1999 or 2000 contains a CRT or not? A. No.")); Toshiba Ex. I (Gloria Comeaux (Nevada) Dep. Tr. 45:17-23, 73:7-14, 76:2-4, 76:2-4 ("Q. And what happened to the user manual? A. I probably threw it away.")).

These named plaintiffs are not unique. One recent study by the Consumer Electronics Associations estimates that 44% of U.S. households disposed of a CRT television in the last five years. *See* Toshiba Defendants' Request for Judicial Notice In Support of Motion to Decertify the Statewide IPP Classes for Damages ("RJN") Ex. A (CEA Market Research Report dated April 2014). The CEA estimates that 27% of U.S. households indicated that they disposed of a CRT monitor in the last five years. Those percentages translate into more than 52 million U.S. households discarding at least one CRT television and 32 million households discarding at least one CRT monitor in the last five years. *Id.* at 1. In contrast, only 49 million U.S. households have a CRT television and just 25 million have a CRT monitor. *Id* at 4. In other words, more households have discarded a CRT television or monitor in the last five years than currently own one. For those individuals who have discarded their CRT products, even an individualized factual inquiry cannot determine class membership. That an overwhelming number of purchasers will have no ability to prove that they purchased a CRT product containing an allegedly price-fixed tube puts this case "well toward the unascertainable end of the spectrum." *In re POM*, 2014 WL 1225184, at * 6 (finding class was not ascertainable where class likely included ten to fifteen million purchasers and "[f]ew if any consumers are likely to have retained receipts during the class period…").

Setting aside that many class members have disposed of their CRT finished products, the IPPs' suggestion that individuals could simply open up their finished products is downright dangerous. One author notes: "Accidentally hitting the tube with a tool, scratching it, dropping it, or any sharp contact with it may cause it to implode. Such an implosion causes glass fragments to fly around with great force and can cause considerable damage and

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physical injury." *See* RJN Ex. B (S.P. Bali, Colour Television, Theory and Practice, p. 129, Tata McGraw-Hill (1994)). Indeed, CRT finished product makers caution U.S. consumers to "[n]ever attempt to service the TV yourself" because "[o]pening and removing the covers may expose you to dangerous voltage or other hazards." *See* Toshiba Ex. J (Toshiba Television Owner's Manual produced by North Carolina class representative) at 4.

But, even if the IPPs had come forward with evidence to support either of the methodologies they put forward at class certification, the methodologies set forth in the IPP lead counsel's declaration would still be inadequate under Rule 23. Each of the IPPs' methods requires a complex class-member-by-class-member inquiry that runs counter to the requirements of Rule 23. *See Sethavanish*, 2014 WL 580696, at *6 (denying class certification where "Plaintiff has yet to present any method for determining class membership, let alone an administratively feasible method."); *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2010 WL 2332081, at *15 (N.D. Cal. June 9, 2010) (declining to certify class due in part due to the "factually-intensive nature and the administrative infeasibility of ascertaining class members."); *In re Phenylpropanolamine (PPA) Prods. Liability Litig.*, 214 F.R.D. 614, 623 (W.D. Wash. 2003) (denying class certification where immense size of the class would make it administratively infeasible to determine who actually purchased ingredient found in certain cough, cold and flu products). Indeed, the IPPs' approaches violate Hornbook class action law. *See Carrera*, 727 F. 3d at 308-09 ("Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individualized factual inquiry.") (quoting Newberg on Class Actions § 3.3 (5th ed. 2011)).

The IPPs' individualized factual inquiries would also require potential class members to individually assert that they meet the criteria for class membership. But that type of self-identification is impermissible when plaintiffs fail to identify "any sort of objective system for screening out" ineligible potential class members. *See Mazur*, 257 F.R.D. at 567-68 (denying class certification where class was unascertainable). The declaration of the IPPs' lead counsel also shows how it is not administratively feasible to determine the identity of CRT

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manufacturers by simply inspecting finished products or their user manuals. In order to determine the manufacturer of the CRT in just a few of the named plaintiffs, the IPPs' counsel had to consult the websites of three different third parties and assess information contained in documents produced by at least six different entities in this case. *See* Toshiba Ex. A at 2-3 (identifying third-party websites "www.samtelcolor.com," "www.partstore.com," and "www.orderpartstoday.com" along with documents produced by Philips, TACP, Panasonic, Chunghwa, MTPD, and LPD). Apart from obvious issues of reliability with third-party websites, the "www.orderpartstoday.com" website used by IPPs at that time appears to no longer exist. *See* Declaration of J. Frank Hogue in Support of the Toshiba Defendants' Notice of Motion and Motion to Decertify the IPP Statewide Classes for Damages at ¶15.

Perhaps recognizing that neither disassembling the finished product nor reviewing model numbers is a sound or administrable methodology, the IPPs apparently have abandoned these unworkable and dangerous methods. During discovery, interrogatories were propounded on the IPPs asking them to identify the evidence upon which they rely to support their claimed ability to trace CDTs and CPTs from manufacturers to end-users. *See* Toshiba Ex. K (IPPs' Objs. & Responses to Def. Panasonic Corporation of North America's First Set of Interrogs.) dated Aug. 13, 2014. The IPPs' response contains no substantive answer. The IPPs list no evidence to support their allegation that there is a traceable chain from CRT manufacturers to end consumers in the relevant states. Instead, the IPPs cite to 12 pages of Dr. Netz's April 15, 2014 report and 12 accompanying exhibits as their support for the traceability of CRTs from manufacturers to the purchasers of finished products. Toshiba Ex. C at 22-25, 111-118. The cited passages and exhibits, however, provide no methodology to determine which indirect purchasers' products contain allegedly price-fixed CRTs. Pages 22-25 contain generic descriptions of the distribution of CRT monitors and televisions, and pages 111-118 simply summarize Dr. Netz's econometric estimate of pass through. Additionally, none of the exhibits that the IPPs point to illustrates any method to ascertain who actually purchased a CRT product containing an allegedly price-fixed CRT. Specifically:

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- Netz Exhibit 10 is an illustration generically depicting various aspects of the CRT and CRT product distribution chain.
- Netz Exhibits 57-60 are lists of documents produced during discovery that Dr. Netz contends support her opinion that pass through occurred.
- Netz Exhibit 62 is a summary of the 62 individual pass through studies that Dr. Netz did showing different pass through rates for different products depending on where they were sold.
- Netz Exhibits 66-70 are illustrations of Dr. Netz's various pass through studies.
- Netz Exhibit 75 is an illustration depicting the portions of the CRT product distribution chains that Dr. Netz studied.

Furthermore, Dr. Netz has admitted in sworn testimony that she has done no analysis to date that would identify those CRT television and monitor purchasers who are class members. Dr. Netz admits that while she has [redacted] Toshiba Ex. L (Netz Oct. 31, 2014 Dep. Tr.) at 21:11-22. Even at this late date, Dr. Netz can only say that [redacted] Toshiba Ex. L at 21:11-23:1. Dr. Netz's musings that a method could ***possibly*** be developed to ascertain which finished products contain allegedly price-fixed tubes does not assist the IPPs in establishing that the class is presently ascertainable, and are too late and too speculative now that discovery is complete. Having relied exclusively on these portions of Dr. Netz's opinion during discovery, the IPPs cannot now come forward with new arguments as to why the IPPs have presented an administratively feasible methodology to ascertain the class. *See Richard v. Hosp. Housekeeping Sys. GP, LLC*, No. 09-6788, 2010 WL 4668468, at *1 (E.D. La. Nov. 4, 2010) (noting that the obligation to amend interrogatory responses and that the obligation be met "with special promptness as the trial date approaches.").

Indeed, it is questionable that Dr. Netz could even attempt to develop a methodology to ascertain class membership. [redacted]

[redacted]

(emphasis added). Toshiba Ex. L (Netz Oct. 31, 2014 Dep. Tr.) at 21:11-22.

The Third Circuit's decision in *Carrera* is instructive here. There the court rejected plaintiff's contention that a class was ascertainable based on the affidavit attesting to how ascertainability could potentially be accomplished. The Court determined that "[s]uch assurances that a party 'intends or plans to meet the requirements' are insufficient to satisfy Rule 23." *See* 727 F.3d at 311 (quoting *Hydrogen Peroxide* and *Comcast*). Dr. Netz's testimony then can only serve to underscore that the IPPs have presented no methodology that could be employed to determine which indirect purchasers purchased television and computer monitors that contain allegedly price-fixed CRTs.

That failure to come forward with a method to determine class membership infringes on the rights of Toshiba to test the reliability of the method used to ascertain class membership. *See Carrera*, 727 F.3d at 307 ("A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim."); *Sethavanish*, 2014 WL 580696, at *5 (endorsing the Third Circuit's reasoning in *Carrera*). Additionally, to the extent that the IPPs persist in their argument that disassembling finished products is a viable method to determine class membership, that process is necessarily an individualized factual inquiry, and therefore antithetical to a Rule 23 class action. *Id.* ("A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership."). The IPPs' failure, along with the fact that most consumers likely no longer possess their CRT products, raises the possibility that the only evidence that any individual owned a CRT product will be their own recollection. Setting aside that such recollection will not extend to the manufacturer of the tube inside of the finished product, such a recollection is

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not a reliable basis on which to determine class membership. *See Carrera*, 727 F.3d at 309 (rejecting argument that class could be ascertained based on affidavits from class members). Such a method is not appropriate "because it does not address a core concern of ascertainability: that a defendant must be able to challenge class membership." *Id.*; *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 440-41 (N.D. Cal. 2014) (Conti, J.) ("Affidavits from consumers alone are insufficient to identify members of the class."). The Third Circuit's reasoning in *Carrera* is particularly compelling here because, like the named plaintiffs there, the class representatives' testimony "suggest[s] that individuals will have difficulty accurately recalling their purchases…" *Carrera*, 727 F.3d at 309. The concern that this case may result in inaccurate or fraudulent claims is compounded by the inability of many of the IPP class representatives to even prove that they purchased a CRT product during the relevant period in one of the relevant states. *See* Toshiba Mot. To Strike Class Representatives With Inadequate Proof of Their Individual Purchases, Case No. 07-5944, filed February 13, 2015.

In support of their ascertainability arguments during class certification, the IPPs dismissed the significance of the fact that millions of CRT televisions and computer monitors contain CRTs manufactured by companies who are not alleged to have conspired. Toshiba IPP Reply at 37. The IPPs acknowledged then that as much as 10% of CRT production was from non-conspirators. *Id.* Following class certification, Dr. Netz estimates [redacted] Toshiba Ex. C at 33. Regardless of whether alleged conspirators accounted for 85% or 90% of global sales, the remainder is not a small number. The IPPs' complaint claims that 315.8 million CRTs were sold in 1998-2000 alone. IPPs' Fourth Am. Compl., Dkt. 1526 at 46. If 15% of those CRTs are indisputably unaffected by the alleged conspiracy, then 47.2 million CRTs (and an equal number of finished products) sold in those three years were unaffected by the conspiracy. Factoring in the other nine years of the alleged conspiracy results in an enormous number of indirect CRT purchasers who were indisputably not injured. And this assume that all these alleged to be conspirators in fact were the sheer number of uninjured consumers raises the likelihood of fraudulent or

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inaccurate claims. When faced with that possibility, in order to establish ascertainability, a plaintiff must come forward with some method "to weed out inaccurate or fraudulent claims." *See Sethavanish*, 2014 WL 580696, at * 6. Without such a method, fraudulent or inaccurate claims could lead absent class members to argue that they were inadequately represented. *See Carrera*, 727 F.3d at 310. Requiring a plaintiff to demonstrate an administratively feasible method to determine class membership reduces such a possibility and preserves the rights of both defendants and absent class members. *Id.* Because the IPPs have failed to come forward with any administrable methodology to ascertain class membership the damages classes should be decertified.

B. The IPP Classes Do Not Meet the Requirements of Rule 23 Because the IPPs Have No Methodology to Measure Impact on a Class-wide Basis

At the initial class-certification stage, Dr. Netz put forth four different methodologies that she believed could be used to determine the impact from alleged overcharges "for CRTs" on a class-wide basis. Toshiba Ex. B at 83-97. The IPPs did not seek this Court's approval for class certification based on an estimate of impact using two different overcharge analyses, different pass-through studies, and two different damages calculations, each looking at CDTs and CPTs separately. Dr. Netz concluded in her sworn declaration that [redacted] Toshiba Ex. B at 71. Yet when Dr. Netz actually performed her work during the merits phase, she estimated overcharges for CPTs and CDTs separately, and estimated pass through using numerous studies with different permutations of customer and product types. This is not the "common, formulaic method" that the IPPs promised. IPPs' Response to Defs. Objs. to R&R, Dkt. 1886 (Aug. 21, 2013) at 6. To estimate overcharges, Dr. Netz "estimated separate CDT and CPT regressions." Toshiba Ex. C at 104. Dr. Netz then separately studied the extent to which her CDT and CPT overcharge estimates were supposedly passed through to end users. *Id.* at 111 ("I calculated separate pass-through rates for monitor tubes (CDTs), TV tubes (CPTs), monitors, and TVs."). Having estimated overcharges and pass-through rates separately for CDTs and CPTs, Dr. Netz then goes on to estimate damages separately for

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CDTs and CPTs. *Id.* at 123 ("I calculate dollar overcharges [i.e., damages] separately for each application type (CPTs and CDTs)…"). The IPPs' decision to analyze CDTs and CPTs separately, and to estimate overcharges, pass-through rates, and damages for each product, as opposed to "for CRTs," shows that the IPPs do not have a common methodology to prove antitrust injury on a class-wide basis, as promised at the class-certification stage.

In determining whether a Rule 23(b)(3) class is certifiable, whether in the context of class certification or a motion to decertify, a court is required to conduct a "rigorous analysis" to determine whether questions of law or fact common to class members predominate. Fed. R. Civ. P. 23(b)(3); *Wal-Mart Stores, Inc.*, 131 S. Ct. at 551; *Comcast*, 133 S. Ct. at 1432 ("Repeatedly, we have emphasized that . . . certification is proper only if the 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied….The same analytical principles govern Rule 23(b).'") (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160-61 (1982)). In the context of reviewing a Rule 23(b)(3) class in a motion for decertification, the plaintiff has the burden to demonstrate that the record continues to support the determination that common questions predominate. *See In re POM*, 2014 WL 1225184 at *5-6 (decertifying class of consumers who could not establish predominance or ascertainability). In the antitrust context: "To proceed with a class action, the plaintiffs must be able to establish predominately with generalized evidence, that all (or nearly all) members of the class suffered damages as a result of defendants' alleged anticompetitive conduct." *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 324 (N.D. Cal. 2014) (denying class certification where the IPPs failed to carry their burden to show they had a methodology capable of establishing class-wide impact). Dr. Netz's post-class-certification analysis establishes that the IPPs do not use "generalized evidence" common to CRTs, but instead use separate evidence regarding CDTs and CPTs. This approach does not satisfy Rule 23(b)(3) and the individual classes for damages should be decertified as they are defined with respect to CRTs—not the separate CDT and CPT products.

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In her post-certification work, Dr. Netz freely admitted to the existence of meaningful differences between CDTs and CPTs. As discussed above, she does not in dispute that CDTs and CPTs are distinct products, each with its own "distinct application" and which "are not functional or economic substitutes." Toshiba Ex. C at 7. Nor is it in dispute that differences between CDTs and CPTs have an effect on the price differences between the two products. *Id.* She analyzed overcharges separately for each of the two products, using different post-cartel periods and obtaining widely varying results ranging from 3-22%. *Id.* at 105 n.8.

The IPPs' "failure to offer a damages model that is capable of measurement across the ***entire*** class" of CRT purchasers precludes class treatment. *Astiana*, 2014 WL 60097, at *13 (emphasis added); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-312 (3d Cir. 2008) ("[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members."). Dr. Netz's separate-product approach also departs from the IPPs' theory of the case. Specifically, the IPPs allege that Defendants "participated in ***a*** global conspiracy to fix prices, limit production, and allocate markets and customers for cathode ray tubes ("CRTs")." IPP Reply at 1. Dr. Netz's departure from the IPPs' allegations puts the IPPs at odds with the Supreme Court's instructions in *Comcast* that "a model purporting to serve as evidence of damages . . . must measure only those damages attributable" to the "theory of antitrust impact accepted for class-action treatment…." *Comcast v. Behrend*, 133 S.Ct. 1426, 1433 (2013). The IPPs sought class action treatment for a class of indirect CRT purchasers allegedly harmed by a single CRT conspiracy. Yet Dr. Netz's analyses measures antitrust impact separately for CDTs and CPTs. When an expert's model departs from the theory of liability, "it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id*. Additionally, Dr. Netz's separate-products approach suggests that class members who indirectly purchased a CDT are not typical of a class member who indirectly purchased a CPT.

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The shortcomings of Dr. Netz's approach to antitrust impact in this case should not be viewed in a vacuum. The same type of analysis by Dr. Netz has been rejected as a basis for class certification in other indirect purchaser antitrust cases. Specifically, Dr. Netz's pass-through studies include the same "top-and-bottom" and "top-to-bottom" studies that were fatal to class certification in *In re Flash*. *See* 2010 WL 2332081, at *12 (determining that Dr. Netz's findings "actually underscore the *individualized* nature of the evidence that will be required to show impact.") (emphasis in original). The court in *In re GPU* also rejected Dr. Netz's pass-through methodology based on "concern[s] about the individualized nature" of her methodology. *In re GPU*, 253 F.R.D. 478, 504 (N.D. Cal. 2008) ("If this class were certified, Dr. Netz's regressions would be either overly reliant on averages and would thus sweep in an unacceptable number of uninjured plaintiffs, or they would be unmanageably individualized.").

Here, in addition to these same "top-and-bottom" and "top-to-bottom" studies from *In re Flash*, Dr. Netz's includes an illustrative example of pass through from a single retailer, Wal-Mart, as well as three multi-level and single-level studies that examine pass through between specific entities for specific products at different levels in the supply chain. Toshiba Ex. C at 116-117. None of Dr. Netz's 62 studies, however, is common to all of the various CRT sellers, CRT product manufacturers, CRT product distributors, CRT product retailers or the various end-customers that comprise the statewide damages classes. Instead, each of the studies measures pass through between specific entities in the supply chain for specific products. Unsurprisingly, the results of these studies vary dramatically. Dr. Netz's reports estimate pass through-rates [redacted] depending on the product and level of the distribution chain she examines. *See* Toshiba Ex. D at Ex. 62. Indeed, Dr. Netz testified that Wal-Mart (a centerpiece in her analysis) has significant buying power. *See* Toshiba Ex. M (Netz Nov. 15, 2012 Dep. Tr.) at 139-19:140-7. Just as in *Flash*, "Netz's analysis amounts to a retailer-by-retailer, manufacturer-by-manufacturer, and product-by-product analysis of pass through." *Flash* at *12 (observing that "this is the identical analytical flaw for which Dr. Netz was criticized in *In re Graphics Processing*").

In antitrust cases in this District, an inability to demonstrate pass-through using a common methodology is grounds to deny class certification. *See In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311, 324, 325 (N.D. Cal. 2014) ("As in *GPU*, it would appear 'that the only way to fully assess pass-through in this action would be to conduct a wholesaler-by-wholesaler and re-seller-by-re-seller investigation, which would essentially result in thousands of mini-trials, rendering this case unmanageable and unsuitable for class action treatment.'") (quoting *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 505 (N.D. Cal. 2008)) (further internal quotations omitted). The IPPs' failure to deliver on their promise to use common evidence to demonstrate pass through, and therefore antitrust impact, should result in decertification of the statewide classes for damages.

V. CONCLUSION

For these reasons, the Court should grant this motion and decertify the IPP statewide damages classes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On February 13, 2015, I caused a copy of "THE TOSHIBA DEFENDANTS' MOTION TO DECERTIFY THE INDIRECT PURCHASER PLAINTIFFS' STATEWIDE CLASSES FOR DAMAGES" to be electronically filed via the Court's Electronic Case Filing System, which constitutes service in this action pursuant to the Court's order of September 29, 2008.

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